83-786

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL TO THE STATE BAR OF NEVADA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTIONS PRESENTED

1. Whether denials without explanation of Petitions for waivers of State Supreme Court rules excluding non-ABA law schools are violative of the Fifth and Fourteenth Amendments when other graduates of non-ABA schools including the Petitioners school are allowed such waivers.

2. Is an ambiguous State Supreme Court procedural process that excuses the Court from having to Answer in a valid case or controversy when the Court is also the Respondent a denial of due process.

3. Is a case ruling by a Federal District Court binding on the District State when the State fails to appeal.

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IN THE

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No.

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL TO THE STATE BAR OF NEVADA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA

JURISDICTIONAL STATEMENT

PARTIES TO PROCEEDINGS

This proceeding originated when the Appellants application for admission to the State Bar of Nevada was rejected without explanation pursuant to a form letter from the State Bar of Nevada dated April 1, 1983, (App. A).

The Appellant then filed a Petition for Waiver of Nevada Supreme Court Rule 51(3), entitled, *In The Matter of the Application of Richard S. Small To The State Bar of Nevada,* no. 14837, on May 9, 1983, in the Nevada Supreme Court, wherein the Nevada Supreme Court and all individual members of the Board of Examiners of the Nevada Bar, and Nevada Bar counsel were served.*

OFFICIAL AND UNOFFICIAL REPORTS

The adjudication of the Appellants application for admission to the Nevada Bar dated April 1, 1983, was by form-letter (App. A).

The Appellant's Petition for Waiver dated May 9, 1983, was denied by Order Denying Petition, dated and entered June 15, 1983 (App. B).

The Appellant's Petition for Rehearing filed on July 5, 1983, was denied by Order Denying Rehearing received August 15, 1983 (App. C).

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*Board of Examiners served; Samuel S. Lionel, Thomas D. Beatty, Booker T. Evans, Frank J. Fahrenkopf, David W. Hagen, Stephen D. Hartman, Thomas E. Lea, Keith L. Lee, Howard D. McGibben, Gary E. DiGrazia. Bar counsel served; Ann Bersi, Kathy Teague.

JURISDICTION

The letter to the Appellant rejecting his application for admission to the Nevada Bar was an adjudication within a judicial proceeding.* *District of Columbia Court of Appeals v. Feldman,* ____ US ____, 75 LEd2d 206, 224, 103 SCt ____ (1983).

The Order denying the Appellant's Petition for Waiver, was a final judgment in a judicial proceeding of the highest state court in a true case or controversy. The validity of state statutes as being repugnant to the Federal Constitution on their face and as applied to the Appellant were considered and upheld as Constitutional by the Nevada Supreme Court.** Jurisdiction of this Court is invoked under 28 USC § 1257(2). *Cohen v. California,* 403 US 15, 18, 29 LEd2d 284, 91 SCt 1780 (1971); *District of Columbia Court of Appeals v. Feldman, supra; Cox Broadcasting Corp. v. Cohn,* 420 US 469, 476, 43 LEd2d 328, 95 SCt 1029 (1975).

A timely Petition for Rehearing, which again asserted to and advised the Respondents of their unconstitutional actions, was filed by the Appellant on July 5, 1983, and denied by Order Denying Rehearing, received August 15, 1983.

A Notice of Appeal to this Court was filed in the Nevada Supreme Court, on October 18, 1983.****

Due to the novelty of the issues herein, the jurisdiction of this Court could in the alternative be invoked under 28 USC § 1257(3).

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*See Appendix "A".
**See Appendix "B".
***See Appendix "C".
****See Appendix "D".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, as pertinent:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment to the United States Constitution provides, as pertinent:

> No person shall * * * be deprived of life, liberty or property, without due process of law * * *

The pertinent portions of the challenged State statutes, Nevada Supreme Court Rules sections 51, 56, and 70, provisions of which are set forth in pertinent part in Appendix "E" herein.

STATEMENT OF THE CASE

I.

DENIAL OF EQUAL PROTECTION

This case involves a rare situation wherein the Nevada Supreme Court sitting as Judge and Respondent in the same case, have denied the Appellant's application for Bar admission and subsequent Petition for Waiver without explanation,

yet this same court has previously granted admission to applicants from the same law school and foreign law schools.[1]

The Appellant's Petition for Waiver and Petition for Rehearing appealed from herein, strongly and consistently asserted throughout, that such adjudication of Nevada Supreme Court Rule 51(3)[2] as applied to the Appellant was a clear unconstitutional denial of his Federal Constitutional rights to liberty, property, equal protection and due process. The Respondent Court upheld the constitutionality of these Federal claims which were drawn into question in a manner directly bearing upon the merits, when it stated in the Order Denying Petition, "(W)e have considered the various contentions and conclude that they are without merit."[3] *Raley v. Ohio*, 300 US 423, 436, 3 LEd2d 1344, 79 SCt 1257 (1959); *Cox Broadcasting Corp. v. Cohn, supra.*

The Respondent Courts only cited authority, *In re Nort*, 96 Nev. 85, 605 P2d 627 (1980), is a confusing and rambling case from which no Bar applicant could interpret the Courts guidelines for waivers of its ABA rule.[4] *Nort* apparently expresses that graduates of non-ABA law schools may only be granted a waiver of the Courts ABA rule when the Petitioners' law school is unaccredited due solely to a factor unrelated to the quality of the education offered. The *Nort* court further held that foreign law schools are unaccredited for a reason unrelated to the quality of education, because they are outside the ABA geographical jurisdiction.[5] The Appellant herein

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[1]See Martindale-Hubble Law Directory, vol. IV, 1983, law school no. 1137, pp. 79-100, Nevada attorneys.

[2]See Appendix "E".

[3]See Appendix "B".

[4]See Appendix "E". SCR 51(3).

[5]It is odd that foreign law schools totally unknown and thousands of miles away, are somehow qualified sight unseen, yet the Appellant's

asserts that his law school is unaccredited for a reason no less equally unrelated to the quality of education offered.[6]

No matter what justification the Nevada Supreme Court wishes to assert,[7] the fact still remains that the Appellant must leave his lifetime home to practice his chosen profession elsewhere when other non-ABA graduates from the same law school and foreign law schools are permitted to practice in Nevada. Without an explanation as to this disparity and inconsistency of treatment as applied to the Appellant, a finding of a denial of equal protection is appropriate. *Louis v. Supreme Court of Nevada,* 490 F.Supp. 1174, 1183 (Nv 1980); *Brown v. Supreme Court of Nevada,* 476 F.Supp. 86, 89 (Nv 1979), reversed on other grounds, 623 F2d 605 (9th Cir. 1980); *Murphy v. Egan,* 498 F.Supp. 240, 244 (Penn. 1980). Nor is the Nevada Supreme Court free to avoid Federal constitutional issues on such inadequate state grounds. *Cardinale v. Louisiana,* 394 US 437, 439, 22 LEd2d 398, 89 SCt 1162 (1969).

---

school, Western State, San Diego, CA, one of the largest law schools in the country, with thousands of graduates practicing law, is not considered qualified. It should be noted that the Appellant offered in his Petition to pay for the investigation of Western State by the Nevada Bar.

[6]Western State is fully accredited by the State Bars in California, Montana, Georgia and Indiana, and approximately 32 other states with reciprocity. Although it is a proprietary school run for profit, there is to date no evidence which has "ruled out the possibility of such schools meeting" all ABA standards, and that ABA standards seem to be "enforced by the states without any serious attempt to validate them." American Bar Foundation, Research Journal, vol. 1978, summer, no. 3, p. 515, 540-541.

[7]Although not a Federal issue, it should be noted that the Appellant's law school was listed as an approved law school in "Inter Alia", the Nevada State Bar Journal, Volume 43, no. 3, December, 1978, the official publication of the Bar. The Appellant relied on this publication to his detriment.

II.

DENIAL OF PROCEDURAL DUE PROCESS

As the denial letter did not advise the Appellant of any procedure for appeal (Appendix A), Appellant filed his Petition for Waiver pursuant to Nevada Supreme Court Rule (SCR) 70, which is entitled, "(A)pplicants not recommended for admission; Notice; Procedure for review."[8] SCR 70(4) provides that an answer to the Petition may be filed within twenty days.[9] After thirty-five days had elapsed and no answer in opposition, the Appellant filed a Motion for Judgment on June 13, 1983, under Nevada Rules of Appellate Procedure 31(c).[10] The Nevada Bar counsel filed an opposition to this motion on the same day, claiming that the Appellant should have filed under SCR 56(1)(b), and that "no responsive pleading is required." Within a matter of hours, the Respondent Court entered its Order Denying Petition on June 15, 1983.[11] The Order totally ignored the Appellant's Motion for Judgment filed two days before, and further told the Appellant he had filed eight days late.[12]

The Appellant's Petition for Rehearing dated July 5, 1983, strongly reasserted that the Courts rules resulted in a denial of procedural due process. The Bar's Opposition to Petition for Rehearing asserted that the Appellant's claims were "ridicu-

[8]See Appendix "E".

[9]*id.*

[10]NRAP 31(c) provides that the failure of a Respondent to file a responding brief may be treated as a confession of error.

[11]See Appendix "B".

[12]Note that Nevada is a Notice pleading state, and was on notice that Appellant filed under SCR 70, yet stood silent for many weeks. Nor can the Respondents now assert untimeliness as a defense on appeal when they failed to assert this before the initial judgment.

lous" and that Petitions for Waiver "do not amount to adversary proceedings."

This Court held in *District of Columbia Court of Appeals v. Feldman, supra,* on March 23, 1983, which the Appellant cited in his Petition for Rehearing, that such petitions were clearly adversary judicial proceedings within a valid case or controversy.[13] Pursuant to *Feldman,* The Respondents are estopped to deny that the Appellant's Petition for Waiver does not have to be answered.

A careful reading of SCR 56(1)(b) and 70, reveals that SCR 56(1)(b) refers to applications not "completed" or "filed" and is ministerial in application and mentions at least twenty-five separate rules. In contrast, SCR 70 is obviously the appropriate rule for a Petition for Waiver.[14] The Respondent's interpretation of its own rules was erroneous, and an unconstitutional denial of procedural due process.

III.

FAILURE OF STATE TO APPEAL

The Appellant's Petition for Waiver and Rehearing both cited *Louis v. Supreme Court of Nevada, supra,* which stated, "(W)here waivers of a rule are not granted with consistency and no explanation is given for the disparity of treatment a finding of denial of equal protection may be appropriate." (*id.* at 1183). *Louis,* like the Appellant was also a non-ABA applicant, who was denied a Petition for Waiver without consistency or explanation.

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[13]District of Columbia Court of Appeals, *supra,* at 220.

[14]See *Louis v. Supreme Court of Nevada, supra,* at 1178.

Appellant asserts that when the Nevada Supreme Court failed to appeal *Louis*, the holdings of the *Louis* case became controlling and binding upon the Nevada Supreme Court, as the *Louis* court expressly stated that the Nevada Supreme Court denied Federal equal protection by denying Petitions for Waivers of SCR 51(3) without consistency or explanation. *H.L. v. Matheson*, 450 US 398, 406, 67 LEd2d 388, 101 SCt 1164 (1981). *Matheson* held that a prior holding of the Utah Federal District Court which stated that a Utah state statute would be unconstitutional if "so applied" by the state to a certain class of citizens, would be controlling on the state since the state failed to appeal. (*id.* at 406). The Respondents by failing to appeal *Louis* are required to give the Appellant an explanation why he is not qualified, as the Appellant is facing the same denial of equal protection complained of in *Louis*. Otherwise the Respondents will be able to continue to deny the Appeallant and countless others equal protection.

THE QUESTION IS SUBSTANTIAL

This case represents an unparalleled situation in American Jurisprudence. In what other case can a man apply for a license, be rejected by a simple form letter, and if he feels he has been denied his Constitutional rights must seek review from this Court. Such an incredible obstacle to climb to begin one's chosen profession in the place of his birth, is in itself a question of paramount substantiality.

The Respondents have been warned that their arbitrary and inconsistent adjudication process for Petitions for Waiver are a denial of due process and equal protection by no less than

two Federal Courts in Nevada.[15] The Respondents have nonetheless upheld as Constitutional the denial of the Appellant's Petition in the exact same manner as previously held as constitutionally repugnant by the Federal District Courts in Nevada. In light of the fact that it is the Nevada Supreme Court itself that is the Respondent in this case, this Court should note probable jurisdiction.

1. Whenever a benefit or a right is statutorily granted by a state, its arbitrary denial or inequal availability violates the Fourteenth Amendment. *Griffin v. Illinois*, 351 US 12, 16-18, 100 LEd 891, 76 SCt 585 (1955). Nevada has granted non-ABA graduates waivers of its non-ABA rule, including graduates from Appellant's law school and foreign countries.[16] The Respondent Court has also arbitrarily denied similarily situated non-ABA graduates who petition for a waiver without explanation.[17]

The Respondents cannot avoid this Federal question by citing *In re Nort, supra.* Nor can they choose to ignore Federal Constitutional law as they have in this case. It is highly improbable that any Judge sitting as both Judge and Respondent, thereby wearing two hats, would hold that he denied a man his constitutional rights. There is a potential for a biased denial of constitutional rights in this situation.[18] The Appellant has simply been denied his constitutional rights by those who wish to regulate the number of attorneys in Nevada.[19]

[15]See *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1183 (Nv 1980); and *Brown v. Supreme Ct. of Nevada*, 476 F. Supp. 86, 89 (Nv 1979), reversed on other grounds, 623 F2d 605 (9th Cir. 1980).

[16]See *In re Nort*, 96 Nev 85, 605 P2d 627 (1980).

[17]See ft. nt. 1.

[18]*Withrow v. Larkin*, 421 US 35, 47-52, 43 LEd2d 712, 95 SCt 1456 (1975).

[19]See *Hoover v. Ronwin*, 51 LW 3776 (5-16-83), No. 82-1474, 686 F2d 692 (1982), this Court has granted certiorari in this case for precisely the same reason.

2. The Nevada Supreme Court has fabricated a highly ambiguous procedural scheme to prevent litigation against the Court itself. Respondents' assertion that a Petition for Waiver is "not an adversary proceeding," is in direct contradiction to this Court's holding in *District of Columbia Court of Appeals v. Feldman, supra.*

Pursuant to the Nevada Supreme Court's interpretation of its own Rules, the Appellant did not have a meaningful opportunity to be heard.[20] Unless this Court reviews such unconstitutionally questionable rules of procedure, future Petitions for Waiver will be an "arid ritual of meaningless form."[21]

It is no coincidence that the Nevada Supreme Court implemented the rules cited as authority for the Appellant's denial shortly after the *Louis* decision. These rules which once again deny any meaningful opportunity to be heard allow the Respondent Court to avoid the constitutional problems created by their arbitrary denials of certain applicants.

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[20] *Boddie v. Connecticut,* 401 US 371, 377, 28 LEd2d 113, 91 SCt 780 (1971).

[21] *Wright v. Georgia,* 373 US 284, 291, 10 LEd2d 349, 83 SCt 1240 (1963); *N.A.A.C.P. v. Alabama,* 357 US 449, 457, 2 LEd2d 1488, 78 SCt 1163 (1958).

CONCLUSION

Probable jurisdiction should be noted.*

Respectfully submitted,

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Attorney for Appellant:
Richard S. Small

*The Court may wish to consider a continuation until this Court hears *Hoover v. Ronwin*, 51 LW 3776 (5-16-83), No. 82-1474, a case concerning Bar antitrust.

APPENDIX A

STATE BAR OF NEVADA

Applicant's Name RICHARD S. SMALL
Date APRIL 1, 1983

Dear 1983 Bar Applicant:

Please be advised your application for admission to the State Bar of Nevada has been received and the following action is being taken:

A._____Application accepted for further investigation and review:
_____No further information required.
_____The following information must be received prior to final acceptance:

1._____Law School transcript.
2._____Current certificate(s) of good standing from state bar, Supreme Court or highest court of state where admitted. States of_____
3._____Other_____

B._____No further action will be taken until the following is received:

1._____Receipt of filing fee or additional payment in the amount of $_____.
2._____Receipt of properly signed and notarized application(s).
3._____Receipt of two completed fingerprint cards.
4._____Receipt of required photographs.
5._____Receipt of completed authorization and release forms.
6._____Receipt of answers to the following questions:
_____
7._____Other_____

C. XXX Application is rejected for failure to comply with the following Supreme Court Rules relating to admissions:

1._____SCR 51(2) relating to residency.
2. XXX SCR 51(3) relating to graduation for an A.B.A. accredited law school.
3._____Other_____

Applicants accepted for further processing will be notified regarding appearance before the appropriate Disciplinary Board.

Deposit of filing fee does not constitute application acceptance.

Stacy Kellison
Admissions

APPENDIX B

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL, FOR ADMISSION TO THE STATE BAR OF NEVADA.

No. 14837

Petitioner.

ORDER DENYING PETITION

Richard Small has petitioned this court for a waiver of the accreditation requirement of SCR 51(3). We have considered the various contentions and conclude that they are without merit. See In re Nort, 96 Nev. 85, 605 P.2d 627 (1980). Furthermore, we note that the petition is untimely under SCR 56(1)(b). Accordingly, the petition is denied.[1]

It is so ORDERED.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

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[1]In light of our decision, Small's request for permission to take the 1983 bar examination pending resolution of his petition is rendered moot.

cc: Samuel S. Lionel, Chairman
Ann Bersi, Executive Director
Kathy Teague, Bar Counsel
Gerald F. Neal
Annette R. Quintana

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL, FOR ADMISSION TO THE STATE BAR OF NEVADA.

No. 14837

Petitioner.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Manoukian, C.J.

/s/ Springer, J.

/s/ Mowbray, J.

/s/ Steffen, J.

/s/ Gunderson, J.

cc: Samuel S. Lionel, Chairman
Ann Bersi, Executive Director
Kathy Teague, Bar Counsel
Gerald F. Neal
Annette R. Quintana

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE APPLICATION	
OF RICHARD S. SMALL, FOR ADMISSION	CASE NO.
TO THE STATE BAR OF NEVADA.	14837

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that RICHARD S. SMALL, the Appellant above named, hereby appeals to the Supreme Court of the United States from final Order denying Petition for Waiver of SCR 51(3), entered in this action on June 15, 1983, and from final Order denying Rehearing, entered in this action on August 11, 1983.

This appeal is taken pursuant to 28 USC § 1257(2).

GERALD F. NEAL, CHARTERED
BY: /s/ Gerald F. Neal
Attorney for Appellant
2770 S. Maryland Parkway, #500
Las Vegas, Nevada 89109

APPENDIX E

TEXT OF STATUTORY PROVISIONS INVOLVED

Rule 51. Qualifications of applicants for examination. An applicant for examination for a license to practice as an attorney and counselor at law in this state shall:

1. Have attained his majority.

2. Be, prior to March 1 of the year in which he wishes to be examined, a bona fide resident and domiciliary of the State of Nevada, and remain such until examined as required by SCR 65, so as to permit and facilitate the examination, investigations, interviews and hearings necessary to determine the applicant's morals, character, qualifications and fitness to practice law.

3. Have received a degree of bachelor of laws, or an equivalent law degree, from a law school approved by the committee on legal education and admissions to the bar of the American Bar Association, and shall present evidence of the same. Provided, however, an applicant may file a bar application and be examined in advance of having received the foregoing degree if the applicant has completed at the time of said bar examination all but the final semester or quarter in law school and furnishes a statement with his bar application from the dean of his law school to the effect that the dean reasonably believes the applicant will receive a law degree at the end of the law school semester or quarter in which the applicant is taking the bar examination, or earlier.

4. Demonstrate that he is of good moral character and that he is willing and able to abide by the high ethical standards required of attorneys and counselors at law.

5. Not have been refused admission to practice law, or have been disbarred from the practice of law, in any state or before any court or governmental agency of the United States on the ground of unfitness of character.

6. Not be subject to any mental or emotional disorder which would render him unfit to practice law.

[As amended; effective April 17, 1977.]

Rule 56. Number and disposition of applications; approval by board of bar examiners.

1. All applications for admission to practice law in Nevada shall be submitted in triplicate and filed with the executive secretary of the state bar pursuant to subsection 1 of Rule 52. Upon receipt thereof, the executive secretary shall transmit immediately one copy to the clerk of the supreme court. The remaining two copies shall be retained by the executive secretary for use in determining the applicant's qualifications for admission.

(a) The executive secretary of the state bar may, upon reviewing the application, determine that the application is not completed or filed in accordance with the requirements of SCR 51 through 55, and may, upon written notification to the prospective applicant, reject the application. Such notification shall include reference to the specific basis for the rejection.

(b) A prospective applicant whose application has been rejected pursuant to SCR 56(1)(a) may, within 30 days from the date of notification, file a verified petition for relief with the Supreme Court, which shall be accompanied by proof of service of a copy thereof upon the executive director of the state bar and the board of bar examiners. Such petition shall be accompanied by copies of all relevant documents. If the court is of the opinion that relief should not be granted, it may deny the petition. Otherwise, the court may enter an order fixing time within which an answer may be filed by the board of bar examiners. Should the court determine that the petitioner is entitled to relief, it may direct the board of bar examiners to process the application in accordance with SCR 57 to SCR 75.

2. No applicant for examination for a license to practice as an attorney and counselor at law in this state shall be eligible for examination until his application has been referred to the state bar and has received the written approval of the board of bar examiners.

3. Commencing with applications filed for the 1966 bar examination, the board of examiners, in its discretion, may permit or refuse to permit an applicant whose verified application complies with the requirements of Rule 52 to take the annual bar examination. If the board has not completed its investigation into the appellant's moral qualifications for admission. If the board of bar examiners has

refused to permit an applicant to take the annual bar examination because its investigation into the applicant's moral qualifications for admision is not completed at the time of the annual bar examination, and the applicant's moral qualifications subsequently receive final approval of the board, the applicant shall be permitted to take the annual bar examination next following such approval without submission of further fees or applications, except the board, in its discretion, may order further character reports, including fingerprint reports, on the applicant during the intervening period.

Nothing herein contained shall be construed to prevent the board from calling to the attention of the court before final admission matters occurring subsequent to the final approval by the board of matters discovered subsequent to final approval.

[As amended; effective October 17, 1980.]

Rule 70. Applicants not recommended for admission: Notice; procedure for review.

1. An applicant not recommended by the board of bar examiners shall be notified by the court, at the applicant's address given in his application, of the fact that the board of bar examiners has recommended that he be denied admission, and whether such recommendation is based upon a failure to pass the examination or upon the applicant's failure to qualify in any other particular.

2. Any applicant so notified may, within a period of 60 days from the date of such notice, file a verified petition for review with the court, which shall be accompanied by proof of service of a copy thereof upon the board of bar examiners.

3. Such petition shall show therein, as may be appropriate, that:

(a) Such applicant was prevented from passing through fraud, imposition or coercion by the board of bar examiners; and

(b) That the applicant meets the qualifications set forth in Rule 51.

4. The board of bar examiners or its representative may, within 20 days after such service upon it of the copy of the petition for review, or within such further time as the court may grant, serve upon the applicant and file in the court an answer. If any such answer is served and filed, the applicant may, within 15 days

thereafter, or within such further time as the court may grant, serve and file a reply thereto.

5. The burden shall then be upon the applicant to establish to the satisfaction of the court that the adverse recommendations of the board of bar examiners were based upon fraud, imposition or coercion and that the applicant fail to meet this burden of proof, the court shall refuse to disturb the adverse recommendations of the board of bar examiners.

[As amended; effective April 27, 1975.]

No. 83-786

IN THE

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October Term, 1983

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL TO THE STATE BAR OF NEVADA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEVADA.

APPELLEE'S MOTION TO DISMISS.

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Questions Presented.

Whether the Board of Examiners of the Nevada Bar is a proper party in this matter?

Whether Appellant has presented a substantial question to this Court?

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No. 83-786

IN THE

Supreme Court of the United States

October Term, 1983

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL TO THE STATE BAR OF NEVADA.

APPELLEE'S MOTION TO DISMISS.

Constitutional Provision Involved.

U.S. Const. Amend. XI.

Statement.

Appellant is a graduate of Western State College of Law, a school which has not been accredited by the committee on legal education and admissions to the bar of the American Bar Association ("A.B.A."). The Nevada Supreme Court Rules ("N.S.C.R.") limit admission to practice law in the State of Nevada to persons who have graduated from law schools accredited by the A.B.A. committee. N.S.C.R. 51(3).

The Nevada Supreme Court has inherent authority to license and regulate attorneys in the State of Nevada. It has delegated to the Board of Governors of the State Bar responsibility for determining qualifications of applicants for admission to practice. The Board of Governors is authorized

to delegate such responsibility to the Board of Bar Examiners. N.S.C.R. 39, 49.

Appellant applied for examination for a license to practice law in Nevada, and was denied pursuant to N.S.C.R. 51(3). Appellant then filed a Petition for Waiver which was denied by the Nevada Supreme Court.

A Notice of Appeal to this Court was filed in the Nevada Supreme Court on October 18, 1983. Appellee obtained an extension of time to respond on December 6, 1983. Appellee believes review in this matter is properly by Petition for a Writ of Certiorari. *District of Columbia Court of Appeals v. Feldman*, ___ U.S. ___, 75 L.Ed.2d 206 (1983). It has therefore captioned its response in alternative terms, in case this Court chooses to view an improvident Appeal as a Petition for such a Writ, 28 U.S.C. §2103.

The Board of Bar Examiners is without authority to license attorneys and is not a proper party in this matter. The Board of Bar Examiners accordingly, prays this Court to dismiss it from this case.

ARGUMENT.

The Nevada Supreme Court has inherent and exclusive authority to license and regulate attorneys in the State of Nevada. N.S.C.R. 39.

Under its authority, the court has promulgated rules for the admission of attorneys in Nevada, and has organized the State Bar of Nevada and the Board of Bar Examiners to administratively accept applications and make recommendations as to admission. The Nevada Supreme Court has, however, retained exclusive jurisdiction and control of the State Bar and the Board of Bar Examiners. N.S.C.R. 76.

As an arm of the Nevada Supreme Court, the Board of Bar Examiners is an administrative agency of the court rather than a "person," and is entitled to immunity from suit under the Eleventh Amendment to the United States Constitution. Thus, the Board of Examiners is not a proper party in this matter. *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966); *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174 (D. Nev. 1980). See also *County of Lincoln v. Luning*, 133 U.S. 529 (1890).

Even assuming, arguendo, that the Board of Bar Examiners could be a proper party in this matter, the Appellant has failed to present a substantial question to this Court. Appellant has effectively conceded that denial of his Petition for Waiver was not arbitrary. Appellant admits that he was referred to *In re Nort*, 96 Nev. 85, 605 P.2d 627 (1980) by the Nevada Supreme Court. In *Nort*, the court explained that Appellant's law school, Western State College of Law, was provided the opportunity to apply for accreditation but failed to do so. Since that time waivers have been denied to graduates of that school. The court has not modified *Nort*.

It is evident that only Western State College of Law graduates are affected by the question presented here. *Nort, supra*, provides ample warning that waivers will not be granted to that school's graduates. One attends at his own peril such an unaccredited school, knowing it is unacceptable in the state in which he will seek to practice. *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174 (D. Nev. 1980). Thus, the question presented by Appellant is insubstantial.

Conclusion.

The Board of Bar Examiners of the State Bar of Nevada is not a proper party and should be dismissed from this Appeal. In the event that this matter is treated as a Petition for a Writ of Certiorari, the Petition should be denied with respect to the Board of Bar Examiners of the State Bar of Nevada.

Respectfully submitted,

LIONEL SAWYER & COLLINS,
ROBERT M. BUCKALEW,
Attorney of Record for Appellee,
Nevada State Board of
Bar Examiners
RODNEY M. JEAN,
EVAN J. WALLACH.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-786

RICHARD S. SMALL, *Appellant,*

v.

BOARD OF BAR EXAMINERS OF THE NEVADA STATE BAR, *Appellees.*

On Appeal From the Supreme Court of Nevada

MOTION OF APPELLEES MANOUKIAN, GUNDERSON, MOWBRAY, STEFFEN AND SPRINGER TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES
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QUESTIONS PRESENTED

Whether Appellant has properly invoked the jurisdiction of the Supreme Court under 28 U.S.C. § 1257(2)?

Whether Appellant has stated a substantial federal question reviewable by appeal or certiorari?

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Appellees Manoukian, Gunderson, Mowbray, Steffen and Springer, the individual Justices of the Supreme Court of Nevada, are of the opinion they have been improperly served as Appellees in the instant

matter. These Appellees were not parties in any proceeding involving the Appellant below. It is only a judicial decision of the Supreme Court of Nevada which is before this Court. However, in the event this Court should conclude that the individual Justices of the Supreme Court of Nevada are properly designated Appellees in the instant matter, they do respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Nevada on the grounds (1) that the validity of no statute of any state has been drawn in question by Appellant, and (2) that the questions on which the decision of the cause depends are not substantial federal questions requiring further argument.

I.

THE NATURE OF THE CASE AND THE PROCEEDINGS BELOW

Appellant unsuccessfully sought a waiver of Rule 51(3) as adopted by the Supreme Court of Nevada originally in 1946. Rule 51(3) requires applicants for the Nevada bar examination to present proof of graduation from a law school approved by the Committee on Legal Education and Admissions to the Bar of the American Bar Association. Appellant is a graduate of Western State University College of Law, which is not now, and never has been, accredited as a law school by the American Bar Association. Appellant's petition to the Supreme Court of Nevada for a waiver of the accreditation rule conceded that Rule 51(3) is a rational means whereby the Supreme Court of Nevada may, in the best

interest of the public, determine the character and general fitness to practice law of those who wish to do so in the State of Nevada. Appellant argued in his petition only that waivers to the rule had been given in the past and that he should likewise receive a waiver. Any denial of a waiver to Appellant would, according to Appellant, be a violation of his Fourteenth Amendment rights.

After due consideration of his arguments and contentions, the same were found by the Supreme Court of Nevada to be without merit for the reasons cited in its decision in In Re Nort, 96 Nev. 85, 605 P.2d 627 (1980). Additionally, it was noted the petition for waiver was untimely under Rule 56(1)(b) of the Supreme Court of Nevada. The petition for waiver was denied by an order filed June 15, 1983.

A subsequent petition for rehearing was also denied on August 11, 1983. Appellant filed a timely notice of appeal to this court.

II.

ARGUMENT

A. NO STATUTE OR COURT RULE ATTACKED BY APPELLANT.

Appellant has failed to show that this case comes within this Court's jurisdiction as an appeal under 28 U.S.C. § 1257(2). By failing in his petition for waiver of Rule 51(3) of the Supreme Court of Nevada to challenge the constitutionality of any state statute, or its equivalent, a court rule, Appellant has not called in question the validity of any such statute or court rule, nor did the denial of his petition for waiver of a court rule necessarily constitute a decision in favor

of validity of said rule. At most, Appellant alleged below that waivers must not be granted or denied in an arbitrary or capricious manner, nor may they be given to some and denied others without a valid reason.

Where an appellant merely claims a deprivation of federal rights by procedures which adversely affect him, he does not establish any jurisdictional basis for appeal to this Court under 28 U.S.C. § 1257(2). At best, discretionary review under 28 U.S.C. § 1257(3) might be possible. Rohr Aircraft Corporation v. San Diego County, 362 U.S. 628 (1962); Wilson v. Cook, 327 U.S. 474 (1946); Charleston Federal Savings and Loan v. Alderson, 324 U.S. 182 (1945); Merzenthaler Linotype Company v. Davis, 251 U.S. 256 (1920). For the reasons set

forth below, even certiorari should be denied in the instant matter.

Even if Appellant had properly raised an attack on a state statute or court rule below, he has failed to continue any such attack in his documents filed with this Court. On page (i) of his Jurisdictional Statement under the heading "Questions Presented," none of the alleged questions challenges the constitutionality of any state statute or court rule. Such a shortcoming by Appellant is a further ground for dismissal of his appeal. Charleston Federal Savings and Loan v. Alderson, supra.

B. APPELLANT RAISES NO SUBSTANTIAL FEDERAL QUESTION.

None of the three questions listed by Appellant in his Jurisdictional Statement constitutes a substantial

federal question requiring further argument to this Court. Indeed, only the first question listed is even worthy of any comment.

Appellant suggests his petition for waiver of Rule 51(3) of the Supreme Court of Nevada was without explanation when other graduates from the same school he attended had received waivers in prior years. Although the Supreme Court of Nevada did not write a lengthy decision on the Appellant's petition, it did, in its order, specifically refer to its earlier opinion in In Re Nort, 96 Nev. 85, 605 P.2d 627 (1980) as the basis for its decision. Nort is a careful and explicit discussion by the Supreme Court of Nevada of the history and rationale of its prior rulings on petitions for waiver of the American Bar Association law school ac-

creditation rule. In particular, the Supreme Court of Nevada in Nort explained why in 1977 and 1978 it granted several waivers to graduates of Western State University College of Law and why beginning in 1979 it would no longer do so. The reason given for granting waivers in the 1977-78 time period related to the allegations that Western State was actually in compliance with all American Bar Association criteria except Rule 202, since it was a proprietary school, and that the only reason the law school was not accredited was for a reason unrelated to its educational quality.

By late 1979 the Supreme Court of Nevada stated it had new information to evaluate, including the well written decision of the Supreme Court of Minnesota in the case of Application of Hansen, 275

N.W.2d 790 (1978), appeal dismissed, 441 U.S. 938 (1979). The Supreme Court of Nevada had learned that notwithstanding the fact it had received the opportunity to do so, Western State University College of Law had failed to apply for American Bar Association certification. After its re-evaluation, Nevada's highest court concluded it could no longer accept the simple assertion that law schools like Western State were unaccredited solely because of the operation of American Bar Association Rule 202. In Nort, the Supreme Court of Nevada also made clear that the burden of proof lies with an applicant to make a showing to the contrary.

All that Appellant offered in 1983 in support of his waiver petition were bare assertions by himself and his law school that Western State offers a

quality education and is in substantial compliance with all relevant factors that go into the quality education formula. Such bare, self-serving assertions, even when coupled with nice letters of personal recommendation of the applicant as an individual, do not even begin to constitute a threshold showing by the Appellant of compliance with the rule or justification for a waiver of the rule. A newspaper clipping from the January 25, 1982 edition of the Los Angeles Daily Journal, offered by Appellant as an exhibit to his petition for waiver, indicated the new president of Western State hoped to have his law school match all American Bar Association standards, adding that A.B.A. accreditation was a goal for the school. Such a reference was some indication that even Western State realized it did not

come up to A.B.A. standards in areas other than Rule 202.

This Court dismissed the appeal in Application of Hansen, 444 U.S. 938 (1979) for want of a substantial federal question. It is respectfully suggested the same action is warranted in the instant matter for the same reason. There is no constitutional right to practice law in one's home state, and there is no constitutional right to evade lawful, reasonable rules established to insure that those who would provide legal counsel to the general public meet certain minimum character and educational requirements.

III.

CONCLUSION

Wherefore, Appellees Manoukian, Gunderson, Mowbray, Steffen and Springer respectfully submit this case totally

fails to satisfy the jurisdiction requirements of 28 U.S.C. § 1257(2) in that no state statute or court rule was ever put in question by Appellant and the questions upon which this cause depends are not substantial federal questions requiring any further argument. Appellees therefore respectfully move this Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Nevada.

Respectfully submitted,

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APPENDIX

Rule 51. Qualifications of Applicants for Examination. An applicant for examination for a license to practice as an attorney and counsellor at law in this state shall:

* * *

3. Have received a degree of Bachelor of Laws, or an equivalent law degree, from a law school approved by the Committee on Legal Education and Admissions to the Bar of the American Bar Association, and shall present evidence of the same.

Rule 56. Number and Disposition of Applications: Approval by Board of Bar Examiners.

1. All applications for admission to practice law in Nevada shall be submitted in triplicate and filed with the Executive Secretary of the State Bar pur-

suant to subsection 1 of Rule 52. Upon receipt thereof, the Executive Secretary shall transmit immediately one copy to the Clerk of the Supreme Court. The remaining two copies shall be retained by the Executive Secretary for use in determining the applicant's qualifications for admission.

(a) The Executive Secretary of the State Bar may, upon reviewing the application, determine that the application is not completed or filed in accordance with the requirements of SCR 51 through 55, and may, upon notification of the prospective applicant, reject the application. Such notification shall include reference to the specific basis for the rejection.

(b) A prospective applicant whose application has been rejected pursuant to SCR 56(1)(a) may, within 30 days from the date of notification, file a

verified petition for relief with the Supreme Court, which shall be accompanied by proof of service of a copy thereof upon the Executive Director of the State Bar and the Board of Bar Examiners. Such petition shall be accompanied by copies of all relevant documents. If the Court is of the opinion that relief shaould not be granted, it may deny the petition. Otherwise, the Court may enter an order fixing time within which an answer may be filed by the Board of Bar Examiners. Should the Court determine that the petitioner is entitled to relief, it may direct the Board of Bar Examiners to process the application in accordance with SCR 57 to SCR 75.

No. 83-786

In The

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October Term, 1983

—o—

IN THE MATTER OF THE APPLICATION OF RICHARD S. SMALL TO THE STATE BAR OF NEVADA

—o—

On Appeal From The Supreme Court of the State of Nevada

—o—

APPELLANT'S OPPOSITION TO MULTIPLE MOTIONS TO DISMISS OR AFFIRM

—o—

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STATEMENT

This Opposition will seperately oppose the Appellee's Motion to Dismiss, Alternatively, Brief for Respondents in Opposition, filed by the Nevada State Board of Bar Examiners, and will also oppose the Motion Of Appellee's

Manoukian, Gunderson, Mowbray, Steffen and Springer To Dismiss Or Affirm, filed by the individual Justices of the Nevada Supreme Court through the Attorney General of the State of Nevada.

ARGUMENT

A. Opposition to the Individual Justices' Motion to Dismiss or Affirm

1. This Motion is untimely, and was filed with the intent to prejudice and delay this appeal and in the interests of justice must not be considered by this Court.

On or about December 2, 1983, Rodney M. Jean, attorney for Appellee Board of Examiners, approached the Appellant's attorney herein, and requested an extension of time *only* for the Board of Examiners. Thereafter an extension of time to respond was signed by Robert M. Buckalew, attorney for the Board of Examiners. Neither the Nevada Supreme Court nor the Nevada Bar were ever mentioned directly or impliedly in the negotiations for said extension. In fact, attorney Rodney M. Jean, very strongly asserted numerous times that the Board of Examiners do not represent the Nevada Supreme Court or the Nevada Bar. There has been absolutely no contact whatsoever to the Appellant from the Nevada Supreme Court, Nevada Bar or the Nevada Attorney General's Office. Furthermore, since the Board of Examiners have moved to dismiss as an improper party, it is prima facie that they did not represent the Nevada Supreme Court when said extension was signed.

An extension of time to file a motion to dismiss or affirm must be presented to this Court, Rule 29.4. Rule 16.1 states that an appellee must file such motions "within 30 days after receipt of the jurisdictional statement." The Nevada Supreme Court has through its own inexcusable neglect, failed to file an extension within which to dismiss or affirm. Accordingly, this motion is untimely, prejudicial and must be stricken by this Court.

2. Assuming arguendo that this motion is timely, the following is in opposition to said motion:

a. *Appellee properly served*

The individual Justices were never the proper parties to this case, nor has the Appellant ever asserted they were. All parties were merely served as a courtesy and the Justices sent seven copies pursuant to Nevada Rules of Appellate Procedure 31(b). The Nevada Supreme Court is the proper party Appellee herein, not the Justices individually.

b. *Statute was sufficiently attacked*

As stated in Appellant's Jurisdictional Statement (J. S. p. 5), the Appellant strongly and consistently throughout the underlying Petition, asserted that N.S.C.R. 51(3) was unconstitutional "as applied", and upheld by the Appellee Court. *Cohen v. California*, 403 U.S. 15, 18 (1971). No particular form of words are essential. The underlying Petition for Waiver sufficiently drew into question the repugnant violations of the Federal Constitution, by describing that graduates of the Appellant's school, foreign law schools and other non-ABA schools were routinely granted waivers, yet the Appellant was arbitrarily denied

without explanation. *Street v. New York,* 394 U.S. 576, 584 (1969). The Appellant has never asserted that denials of such waivers were unconstitutional per se. The underlying Petition asserted that Nevada has statutorially granted a benefit and right in Petitions for Waiver to a similarly situated class, and that the arbitrary denial and inconsistent application of that benefit violates the Fifth and Fourteenth Amendments. *Griffin v. Illinois,* 351 U.S. 12, 16-18 (1955). This Court clearly has jurisdiction as an appeal. See *District of Columbia Court of Appeals v. Feldman,* — U.S. —, 75 L.Ed.2d 206, 218, 222, 225, (1983), where this Court invitingly stated three times that "review of such determinations can be obtained only in this Court."

c. *The question is substantial*

The Appellee Court's only explanation to the Appellant was *In re Nort,* 96 Nev. 85, 605 P.2d 627 (1980), which told the Appellant little else than graduates of foreign law schools can practice in Nevada under extremely convoluted reasoning. To hold that a foreign law school is automatically acceptable because it is outside the geographical jurisdiction of the ABA is an absurd reasoning that contradicts itself. Is it not possible for a foreign law school to be run for profit and be acceptable and an American school run for profit be unacceptable under this reasoning. Rule 202 means very little to Nevada, it is only a technical guise to arbitrarily regulate the number of attorneys in Nevada, which is not rationally related to protection of the public. It is important to remember that Nevada had no law school when the Appellant began his legal education in 1978.

The Appellant in his Petition for Waiver tried to follow *Nort* to meet his burden of proof. The Appellant submitted the most comprehensive Petition humanly possible in twenty-five pages. Western State is arguably as fine a law school as any in the Phillipines.[1] The Appellant has cited superior authority in his jurisdictional statement (J. S. p. 6) to support his alleged denial of equal protection. *Murphy v. Egan,* 498 F.Supp. 240, 244 (Penn. 1980).

Finally, any mention of the Appellant's untimely Petition for Waiver (Motion p. 3), is irrelevant, since the Petition for Waiver went to final judgment, any untimeliness was waived by the Appellees. N.S.C.R. 56(1) (b), was also not the appropriate rule (J.S. Ex. 'E', pp. 2e-3e), and is clearly in contradiction to *Feldman,* and an unconstitutional denial of procedural due process. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 457 (1958).

B. Opposition to Motion to Dismiss of the Board of Examiners

1. In one breath, the Board of Examiners have asserted they are not proper parties, yet with the next breath they attempt to argue the merits of this case for the Nevada Supreme Court. The two positions are inconsistent. The Board of Examiners do not represent the Nevada Supreme Court. Furthermore, the Board of Examiners have prayed for nothing other than their own dismissal. (Mo-

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[1] The Chairman of the Nevada Board of Bar Examiners, Samuel S. Lionel, personally told the Appellant during a private meeting, that a graduate of a law school in the Phillipines was granted a Waiver in 1982. In 1982 a Ms. Julia Ledbetter, a graduate of the Potomac School of Law, the same law school as Appellant Hickey in *Feldman,* was also granted a Waiver.

tion p. 2). Accordingly, any discussion as to the merits by the Board of Examiners in said motion, is an inappropriate attempt to dismiss this appeal indirectly when they have chosen not to challenge it directly, and should not be considered by this Court.

2. In opposition to the inappropriate discussion on the merits, the Board of Examiners stated belief that review in this matter is properly by Writ of Certiorari is misplaced. Although the District of Columbia Court of Appeals is considered the same as a state's highest court, *Feldman* was an appeal from a Federal Court, and as such could only be reviewed by this Court by Writ of Certiorari. 28 U.S.C. § 1254. *Feldman* does not stand for the theory that review by this Court of denials of Petitions for Waivers of State Supreme Court Rules is only by Writ of Certiorari. Indeed, *Feldman* invites review by this Court.

3. Irrespective of the Board of Examiners' inappropriate attempt to argue the merits as a non-party, they have asserted inconsistencies which the Appellant must defend.

a. The Board of Examiners assert that the Appellant has "effectively conceded that denial of his Petition for Waiver was not arbitrary." (Motion p. 3). This is totally incorrect. The Appellant has never conceded that the denial of his Petition for Waiver was not arbitrary. To the contrary, the entire gravamen of the Appellant's Petitions for Waiver and Rehearing was the arbitrary and unconstitutional denial as applied of his admission, as well as the denial of procedural due process in the adjudication of his Petitions for Waiver and Rehearing.

b. The Board of Examiners further assert that the Appellant was "referred" to *Nort* (Motion p. 3), which

gave the Appellant "ample warning" that his law school was not acceptable in Nevada. (Motion p. 4). This is an impossibility. *Nort* was decided two years after the Appellant had applied for admission to Western State. Furthermore, since graduates of Western State were allowed to sit for the Nevada Bar before *Nort,* the Appellant did not knowingly apply to an unacceptable school to the Nevada Bar. It is also apparent that at least one graduate of Western State was allowed to sit for the Nevada Bar *after Nort* as well. Martindale-Hubble Law Directory, vol. iv (1983), Nevada Attorneys, p. 79, Robert F. Blankenbush. It should also be pointed out that Western State was listed as an acceptable school in the Nevada Bar Journal in 1978, before the Appellant applied for admission to Western State. (J.S. p. 6 n. 7). Appellant detrimentally relied on these official Bar publications.

CONCLUSION

In essence, the Nevada Supreme Court as the only proper-party Appellee to this case, has not responded to the Appellant's Jurisdictional Statement. The untimely Motion to Dismiss or Affirm from the Justices of the Nevada Supreme Court is in their individual capacities, and the Board of Examiners moving for non-party dismissal, are the only responses. Both motions discussions on the merits are inappropriate and should not be considered by this Court. This case is a question of paramount substantiality because the Appellant has been denied his Constitutional rights by the very guardians of civil liberties

in Nevada. The Appellant and the thousands of non-ABA graduates in this country, cry out for a meaningful opportunity to be heard. Probable jurisdiction should therefore be noted.

Dated this 17 day of January, 1983.

Respectfully submitted,

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